Petition

Office - Supreme Court, U.S.
FILED
OCT 27 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ASAE SHIMOKAWA, Petitioner,

v.

LIBERTY BANK, Respondent.

ON WRIT OF CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

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The petitioner Asae Shimokawa respectfully prays that a writ of certiorari issue to review the opinion of the Intermediate Court of Appeals of the State of Hawaii entered in the above-entitled case on July 9, 1981.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the appellate court denied the petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States when it arbitrarily changed and misstated the trial court's findings of fact

and based its decision to reverse the trial court's judgment on such changed and misstated facts, which have no support in the evidence.

2. Whether the appellate court denied the petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States when it arbitrarily changed and misstated the trial court's findings of fact without applying or mentioning the well-settled "clearly erroneous" rule and based its decision to reverse the trial court's judgment on such changed and misstated facts, which have no support in the evidence.

3. Whether the appellate court denied the petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States when it violated and disregarded the fundamental principles of contract law in order to arbitrarily reverse the trial court's judgment.

LIST OF PARTIES

Asae Shimokawa, petitioner
(defendant-appellee)

Liberty Bank, respondent
(plaintiff-appellant)

James W. Shimokawa, defendant in Civil No. 50806, Circuit Court of the First Circuit, State of Hawaii. James W. Shimokawa did not file an answer to the complaint of Liberty Bank filed on February 23, 1977, and hence a default judgment was entered against him on September 23, 1977.

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REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the Intermediate Court of Appeals of the State of Hawaii in this case is reported in 2 Hawaii App. ____, 632 P.2d 289 (No. 7189, July 9, 1981) and is duplicated in Appendix A attached hereto. The order of the Supreme Court of the State of Hawaii denying the application for a writ of certiorari, filed on July 29, 1981, is unreported and is duplicated in Appendix B attached hereto. The findings of fact and conclusions of law of the trial court, filed on July 28, 1978, in Civil No. 50806 in the Circuit Court of the First Circuit, State of Hawaii, is unreported and is duplicated in Appendix C attached hereto. The judgment of the trial court, filed on August 1, 1978, is unreported and duplicated in Appendix D attached hereto.

For convenience the following abbreviations will be used herein: "R." for record of the trial court (Circuit Court of

the First Circuit of the State of Hawaii) in Civil No. 50806; "R. of S. Ct." for the record of the appellate courts (Intermediate Court of Appeals of the State of Hawaii and Supreme Court of the State of Hawaii) in No. 7189; "Tr." for the transcript of the trial proceedings; "F.F." for the findings of fact of the trial court; and "C.L." for the conclusions of law of the trial court.

JURISDICTION

The opinion of the Intermediate Court of Appeals of the State of Hawaii was entered on July 9, 1981. A timely application to the Supreme Court of the State of Hawaii for a writ of certiorari was denied on July 29, 1981, and this petition for certiorari was filed within 90 days of that date. Under Rule 32(b) of the Rules of the Supreme Court of the State of Hawaii, "Review by the supreme court of a decision of the intermediate court of appeals is a matter within the discretion of the supreme court," and under

Rule 32(i) of the Rules of the Supreme Court of the State of Hawaii, the denial of an application for a writ of certiorari is not "subject to reconsideration in the supreme court." Thus the opinion of the Intermediate Court of Appeals stands, in accordance with 28 U.S.C. §1257, as the "final decision of the highest court of the state in which a decision could be had." The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) in regard to a title, right, privilege, or immunity specially set up or claimed under the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Constitution of the United States,

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii Revised Statutes:

§602-5 Jurisdiction and powers. The supreme court shall have jurisdiction and powers as follows:

(1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency . . . .

Jurisdiction of Intermediate Court of Appeals:

[§602-57] Jurisdiction. The intermediate appellate court shall have concurrent jurisdiction with the supreme court on all matters set out in section 602-5(1) through (7), subject to assignment of cases set out in section 602-5(8). [L 1979, c 111, pt of §3]

Rules of the Supreme Court of the State of Hawaii:

Rule 32. APPLICATION FOR WRIT OF CERTIORARI IN THE SUPREME COURT.

(b) Discretion of the Court. Review by the supreme court of a decision of the intermediate court of appeals is a matter within the discretion of the supreme court.

(i) No Reconsideration of Acceptance or Rejection of Application for a Writ of Certiorari. Neither acceptance nor rejection of an application for a writ of certiorari shall be subject to reconsideration in the supreme court.

Hawaii Rules of Civil Procedure:

Rule 52. FINDINGS BY THE COURT.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

I. FACTS MATERIAL TO QUESTIONS PRESENTED

This is a case involving the validity of a continuing guaranty alleged to have been "executed and delivered" by Asae Shimokawa (petitioner-appellee) to Liberty Bank (respondent-appellant) on or about February 15, 1972, to guarantee "any and all indebtedness" of her then husband, James W. Shimokawa, to Liberty Bank. R. 1-5. Mr. and Mrs. Shimokawa were divorced on July 31, 1974. F.F. No. 3. Liberty Bank brought suit against James W. Shimokawa on a loan made to him on March 14, 1975, about seven and a half months after the divorce, and against Asae Shimokawa on the continuing guaranty. In its complaint filed on February 23, 1977, Liberty Bank alleged that James W. Shimokawa "executed and delivered" a promissory note for the loan on or about March 14, 1975, and that Asae Shimokawa "executed and delivered" the continuing guaranty on or about February 15,

1972. R. 1-5. Asae Shimokawa denied the allegations of the complaint against her. R. 11-14, 250-52. Since James W. Shimokawa failed to answer the complaint, a default judgment for $17,249.28 was entered against him on September 23, 1977. R. 48-50, 72-76.

The case between Liberty Bank and Asae Shimokawa proceeded to trial before the trial court (a judge of the Circuit Court of the First Circuit) without a jury on July 15, 1978. See transcript of trial proceedings. The principal witnesses at the trial were Henry Murakami, a branch manager of Liberty Bank, and Asae Shimokawa. James W. Shimokawa was not called as a witness by Liberty Bank and did not appear at the trial. Based on the testimony of the witnesses and the documents in evidence, the trial court found that Asae Shimokawa had no knowledge of the continuing guaranty or of her former husband's loans at Liberty Bank (F.F. Nos. 7, 9, 10, 16); that she had no knowledge or recollection of ever signing or having signed

the continuing guaranty (F.F. Nos. 11, 16); that she did not intend to sign or give a continuing guaranty to Liberty Bank (F.F. Nos. 11, 16); that she did not deliver or mail the continuing guaranty to Liberty Bank or authorize anyone else to do so (F.F. No. 2); that if she had known of the continuing guaranty at the time of her divorce on July 31, 1974, she would have revoked it (F.F. No. 9); that the giving of a continuing guaranty for an unknown or unlimited amount would have been against the rules of conduct of the Internal Revenue Service where she worked (F.F. No. 11); that she never had any business dealings with Liberty Bank (F.F. No. 13); that there was no mutual assent or meeting of the minds between Liberty Bank and Asae Shimokawa with respect to the continuing guaranty or its essential terms, especially the amount of liability, due to the total absence of communication between the two parties (F.F. Nos. 10, 16, 18); and that there was no consideration for the

continuing guaranty (F.F. Nos. 7, 8, 15, 16, 18, 19). Accordingly, the trial court found in favor of Asae Shimokawa and against Liberty Bank. F.F. No. 20. The trial court was of the view that elementary fairness on the part of Liberty Bank was lacking in this case due to the bank's failure to give Asae Shimokawa notice of the continuing guaranty or a copy thereof at the time it received the continuing guaranty on or about February 15, 1972, or to inform her of the loan and the continuing guaranty on March 14, 1975, since the bank knew at that time that Mr. and Mrs. Shimokawa had already been divorced. F.F. No. 17. For a fuller statement of the facts, see Findings of Fact and Conclusions of Law attached hereto as Appendix C.

In its Conclusions of Law, the trial court resolved the issue of credibility against Liberty Bank and in favor of Asae Shimokawa (C.L. No. 1) and concluded that Liberty Bank failed to sustain its allegations of execution and delivery of the

continuing guaranty by Asae Shimokawa (C.L. No. 2), that the continuing guaranty was invalid due to the absence of any communication and mutual assent or meeting of the minds between Liberty Bank and Asae Shimokawa (C.L. No. 3), that the continuing guaranty was also invalid for lack of consideration (C.L. No. 4), and that contracts of guaranty are strictly construed in favor of guarantors (C.L. No. 5).

The judgment of the trial court entered on August 1, 1978, was reversed by the Intermediate Court of Appeals on July 9, 1981. In its decision reversing the findings, conclusions, and judgment of the trial court, and holding that a valid contract of continuing guaranty was entered into between Liberty Bank and Asae Shimokawa, the Intermediate Court of Appeals failed to mention the "clearly erroneous" rule governing review of findings of fact.

II. FEDERAL QUESTIONS

A. HOW FEDERAL QUESTIONS AROSE

The federal questions in this case arose as the result of the arbitrary and baseless action of the Intermediate Court of Appeals in reversing the trial court's judgment by changing the trial court's findings of fact and disregarding the well-settled "clearly erroneous" rule governing appellate review of findings of fact and also disregarding fundamental principles of contract law. The arbitrary and capricious decision of the Intermediate Court of Appeals clearly denied the petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

B. HOW FEDERAL QUESTIONS PRESENTED

The grounds for the federal questions were fully presented to the Intermediate Court of Appeals in petitioner's answering brief (R. of S. Ct. 94-174). Petitioner pointed out to the Intermediate Court of

Appeals that the trial court's findings were not only supported by substantial evidence but were irrefragably correct and, accordingly, the application of the "clearly-erroneous" rule to the findings of the trial court constrained affirmance of the trial court's judgment. Yet, the Intermediate Court of Appeals reversed the trial court's judgment by assuming or positing facts which were antipodal to the trial court's findings and found the continuing guaranty to be a valid contract. In reaching its decision the Intermediate Court of Appeals disregarded, indeed changed, the trial court's findings and disregarded the well-settled "clearly erroneous" rule governing appellate review of findings of fact on appeal and also disregarded the fundamental principles of contract law. A comparison of the opinion of the Intermediate Court of Appeals (Appendix A) and the findings of fact and conclusions of law of the trial court (Appendix C) will show the

glaring error of the Intermediate Court of Appeals in clear relief.

Similarly, the grounds for the federal questions were fully presented to the Supreme Court of the State of Hawaii in petitioner's application for a writ of certiorari. R. of S. Ct. 239-85. Petitioner pointed out in her application that the Intermediate Court of Appeals had arbitrarily reversed the trial court's judgment by changing the trial court's findings of fact and disregarding the well-settled "clearly erroneous" rule governing appellate review of findings of fact and also disregarding fundamental principles of contract law. Accordingly, petitioner requested in her application (at page 26) that the writ be granted "in the interest of justice and due process of law." R. of S. Ct. 268. Petitioner's application for a review of the arbitrary and baseless decision of the Intermediate Court of Appeals was denied.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This is a petition seeking a review of the arbitrary and capricious decision of an appellate court and its abuse of power and usurpation of the function of the trial court. Based on the testimony of witnesses and the documents in evidence, the trial court made appropriate findings of fact and conclusions of law thereon and entered judgment in favor of petitioner. On appeal, the Intermediate Court of Appeals of the State of Hawaii arbitrarily, capriciously, incomprehensibly and unjustifiably reversed the findings, conclusions and judgment of the trial court. The application to the Supreme Court of the State of Hawaii for a writ of certiorari to review the unprecedented and indefensible decision of the appellate court was denied. The unexpected denial left petitioner with no recourse but to seek redress in this Court in the interest of justice, fairness and due process of law.

II. BASIS FOR GRANTING CERTIORARI

The questions presented by this petition are: First, did the appellate court arbitrarily and capriciously change and misstate the findings of the trial court and the undisputed facts in this case? Second, did the appellate court arbitrarily and capriciously disregard the well-settled "clearly erroneous" rule governing appellate review of findings of fact? Third, did the appellate court arbitrarily and capriciously disregard the fundamental principles of contract law? Finally, did the arbitrary and capricious action of the appellate court cross the Rubicon and present constitutional questions? The answer to each of these questions is clearly yes. These questions and their ineluctable answers will be discussed more fully hereafter.

III. ARBITRARY AND CAPRICIOUS DECISION

A. IRREFRAGABLE FINDINGS OF FACT

The decision of the appellate court is totally wrong from the standpoint of the facts, from the standpoint of the "clearly erroneous" rule applicable to appellate review of findings of fact, and from the standpoint of the fundamental principles of contract law. The decision is so egregious that it shocks the conscience. Petitioner attempted to have it reviewed by the Hawaii Supreme Court, but her request was denied.

Liberty Bank having alleged in its complaint that Asae Shimokawa executed and delivered the continuing guaranty to it on or about February 15, 1972, and Asae Shimokawa having denied the allegations, Liberty Bank then had the burden of proving its allegations that Asae Shimokawa executed and delivered the continuing guaranty to it and that a valid contract of guaranty was entered into between them. The evidence in this case established beyond any doubt that

Liberty Bank failed to prove not only the execution and delivery of the continuing guaranty by Asae Shimokawa to it but also the formation of a valid contract of guaranty between them. Accordingly, the trial court orally found at the trial and held in its subsequent written findings of fact and conclusions of law that "(u)pon the credible evidence adduced, Liberty Bank has failed to sustain the allegations of the Complaint as to Asae Shimokawa." Tr. 100; R. 296-97.

After considering the evidence, the trial court found that Asae Shimokawa had no knowledge of her former husband's loans at Liberty Bank or the continuing guaranty, that she had no knowledge or recollection of ever signing or having signed the continuing guaranty, that she never had any business dealings with Liberty Bank, and that she did not intend to sign or give any continuing guaranty to Liberty Bank. F.F. Nos. 9, 10, 11. The trial court also specifically found that Asae Shimokawa did not deliver or mail

the continuing guaranty to Liberty Bank or authorize her former husband or anyone else to deliver or mail the continuing guaranty. F.F. No. 12. Hence at no time did Asae Shimokawa offer herself as a guarantor to Liberty Bank for any of her former husband's loans. Since no offer of a continuing guaranty was ever made by Asae Shimokawa to Liberty Bank, there was no continuing guaranty from Asae Shimokawa which Liberty Bank could have accepted. The trial court further found that there was no consideration because Liberty Bank did not rely on the continuing guaranty for its loans to Mr. Shimokawa. The trial court's findings that Asae Shimokawa had no knowledge of the continuing guaranty or her former husband's loans at Liberty Bank and the total absence of communication between Liberty Bank and Asae Shimokawa precluded any negotiated or bargained-for consideration. F.F. Nos. 7, 8, 9, 10, 11, 13, 15, 18.

In sum, not one of the elements requisite for the formation of a valid contract was found to exist by the trial court. Based as they were on the testimony of the witnesses and the documents in evidence, the trial court's findings of fact were unassailable; yet the appellate court found otherwise, in contravention of the trial court's findings and the undisputed facts.

Despite the unassailable findings of fact of the trial court, the appellate court took it upon itself to become another trial court on the appeal and arbitrarily changed the findings of the trial court in a procrustean way and violated fundamental principles of appellate review and contract law and, beyond that, usurped the primacy of the trial court. Clearly such violations by the appellate court denied the petitioner her constitutional rights of due process of law and equal protection of the laws. See United Gas Public Service Co. v. State of Texas, 303 U. S. 123, 143 (1938).

B. MISSTATEMENTS, ERRORS, AND OMISSIONS IN APPELLATE DECISION

The decision of the appellate court is replete with errors, misstatements, and omissions on every page of its opinion, as the following discussion will clearly show.

1. In the first sentence on page one of its opinion, the appellate court changes one of the key facts and findings of the trial court by erroneously stating that the continuing guaranty was "given" to Liberty Bank by Asae Shimokawa. This misstatement of fact is diametrically contrary to the specific finding of the trial court and the undisputed evidence that Asae Shimokawa never gave or delivered the continuing guaranty to Liberty Bank or authorized anyone else to do so. F.F. Nos. 11, 12. The nondelivery of the continuing guaranty by Asae Shimokawa or her agent was so clear and conclusive that the finding of nondelivery of the continuing guaranty was not even disputed by Liberty Bank. Liberty Bank did not

specify it as error by quoting it in its opening brief under "Specification of Errors" as required by Rule 3(b)(5) of the Rules of the Supreme Court of the State of Hawaii if error is urged of any findings of the trial court. Thus the finding of nondelivery of the continuing guaranty by Asae Shimokawa or her agent was not even raised as error by Liberty Bank; yet the appellate court, sua sponte, arbitrarily and capriciously reversed the trial court's finding. Liberty Bank admitted and the trial court so found that Liberty Bank did not know from whom it received the continuing guaranty. F.F. No. 5. No evidence was presented by Liberty Bank as to the circumstances under which the signature of Asae Shimokawa was affixed on the continuing guaranty or as to who delivered it to the bank. Although Liberty Bank had the burden of proving its allegations, it did not call Asae Shimokawa's former husband as a witness to explain any of the circumstances surrounding the continuing guaranty.

Thus this irrefragable and undisputed finding of the trial court, which by itself provided sufficient justification to affirm rather than reverse the trial court's judgment, proves that the erroneous decision of the appellate court was arbitrary and without basis.

2. Also in the first sentence of its opinion, the appellate court changes another key finding of the trial court by erroneously stating that the promissory note was executed after the "execution" of the continuing guaranty. This statement erroneously presupposes that Asae Shimokawa "executed" the continuing guaranty, that is, she was aware of the nature of the instrument on which her signature appeared and intended to offer herself as a guarantor to Liberty Bank. This statement is again contrary to the specific findings of the trial court and the undisputed evidence that Asae Shimokawa had no knowledge of the continuing guaranty or of her former husband's loans at Liberty

Bank, that she had no knowledge or recollection of ever signing or having signed the continuing guaranty, that she did not intend to sign or give any continuing guaranty to Liberty Bank, and that she had no communication or dealing whatsoever with Liberty Bank. F.F. Nos. 7, 9, 10, 11, 12, 16, 18. The total lack of knowledge on the part of Asae Shimokawa regarding the continuing guaranty or her former husband's loans at Liberty Bank and the total absence of communication between the parties precluded the possibility that Asae Shimokawa was even aware of the nature of the instrument on which her signature appeared or that she intended to offer herself as a guarantor to Liberty Bank.

3. The statement of the "underlying issues" in the second sentence (or second paragraph) on page one of the opinion is likewise erroneous, for the underlying issues were raised by the allegations in the complaint, to wit, whether Asae Shimokawa

"executed and delivered" a continuing guaranty to Liberty Bank, not "whether the continuing guaranty as executed by appellee is a valid, enforceable contract of guaranty between the appellee and the bank" as stated in the opinion. (The issue as to "whether there was adequate consideration given for subsequent loans" made to Mr. Shimokawa is irrelevant to the issues of this case.)

4. The statement in the fifth paragraph of page one of the opinion that Henry Murakami required James Shimokawa to obtain a continuing guaranty from his wife "as a condition of the bank's approval of the loan" is also erroneous and contrary to the trial court's finding in finding of fact No. 19, that "the Bank did not rely on the Continuing Guaranty in making the first loan to James W. Shimokawa on February 11, 1972," since the loan had been previously approved and the funds disbursed to and received by James Shimokawa prior to the receipt of the continuing guaranty by the bank (from whom

the bank does not know) and since no financial statement had been requested or received from Asae Shimokawa. F.F. Nos. 4, 7, 15, 19.

5. In the first paragraph of page two, the appellate court mentions "lack of communication and mutual assent between Liberty Bank and appellee" and thus is evidently aware of the trial court's finding that the total absence of communication between the parties precluded "mutual assent or meeting of the minds for the formation of a contract between them." The appellate court does not dispute or even discuss this finding anywhere in its opinion. Thus it follows that the appellate court concurs with this finding. If so, then it would have been impossible to find the opposite, namely, a valid contract, as the appellate court did. For this reason alone, if for no other, the decision of the appellate court was clearly arbitrary, capricious, and erroneous. In reaching the decision to reverse the trial court's

judgment, the appellate court necessarily had to change the trial court's finding that the total absence of communication precluded the requisite mutual assent or meeting of the minds for the formation of a contract between the parties.

6. In the first paragraph of page two, the appellate court stated that "The parties (sic) were divorced in July 1974, but the continuing guaranty was not revoked by the appellee." This statement erroneously presupposes, contrary to the trial court's findings of fact, that Asae Shimokawa executed the continuing guaranty and was aware of its existence when in fact she had no knowledge and was not aware that such document existed and therefore had no reason to revoke it. The trial court found that Asae Shimokawa had no knowledge of the continuing guaranty or her former husband's loans and had no knowledge or recollection of ever signing a continuing guaranty to Liberty Bank. F.F. Nos. 7, 9, 10, 11, 16. Thus it

is erroneous to imply, as the appellate court does, that Asae Shimokawa had an opportunity at the time of her divorce to revoke the continuing guaranty. To the contrary, had she known of the continuing guaranty at the time of her divorce in 1974, she would have revoked it, as testified by her and as found by the trial court. F.F. No. 9.

7. In the last sentence of the first paragraph of page two, the appellate court correctly acknowledges the finding of the trial court that "there was no intent" on the part of Asae Shimokawa to sign a continuing guaranty to Liberty Bank. It is clear from this statement that the appellate court understands that a finding of Asae Shimokawa's intent was necessary to find a valid contract. Although acknowledging this finding, the appellate court, nonetheless, arbitrarily disregards the trial court's finding that Asae Shimokawa did not intend to sign or give a continuing guaranty to Liberty Bank and contrarily finds that Asae

Shimokawa entered into a contract despite her undisputed lack of intent to do so.

8. In the first sentence of page three, although the appellate court states that "the continuing guaranty is an offer from the guarantor," it completely disregarded the trial court's findings that at no time did Asae Shimokawa offer a continuing guaranty to Liberty Bank, and thus the appellate court, without any basis, arbitrarily and erroneously concluded or assumed that Asae Shimokawa offered the continuing guaranty to Liberty Bank.

9. The statement of the appellate court at the bottom of page three that the trial court found the continuing guaranty contract to be "void" for the reasons ascribed by the appellate court is a gross and obvious misstatement of the trial court's reasons for invalidating the continuing guaranty.

10. At the top of page four, the appellate court, in stating that Asae

Shimokawa "waived" any notice under the terms of the guaranty, erroneously presupposes that she executed and delivered a continuing guaranty to Liberty Bank, contrary to the trial court's findings. The accompanying statement by the appellate court that it "cannot extend" the terms of a contract is inconsistent with the finding by the appellate court of the existence of a contract between two strangers who had never communicated or dealt with each other.

11. The appellate court's statement toward the end of page four to the effect that "the continuing guaranty was sufficient consideration for the March 1975 loan" again erroneously presupposes, contrary to the trial court's findings of fact, a valid contract based on communication and mutual assent or meeting of the minds.

12. At the beginning of page five, the appellate court flagrantly misstates the testimony of Asae Shimokawa by stating that "she thought she was signing a loan document

instead of a continuing guaranty." This flagrant misstatement is diametrically contrary to Asae Shimokawa's testimony and the findings of the trial court. Since Asae Shimokawa had no knowledge whatsoever of ever signing a continuing guaranty to Liberty Bank, she was completely unaware of its existence. Thus the appellate court again flagrantly misstates and changes a finding of fact.

13. Also at the beginning of page five, the appellate court's statement that "lapse of memory is not a valid basis on which to disprove intent sufficient to invalidate a contract" is simply irrelevant to the issues of this case, since Asae Shimokawa never testified to any "lapse of memory" and no such defense was ever raised in the pleadings or at the trial. The appellate court is evidently confused between total lack of knowledge and total unawareness on the one hand and lapse of memory on the other. Contrary to the appellate court's unwarranted and irrelevant discussion in the middle of

page five, this is obviously not a case of a party who did not "read or understand" a document he or she knowingly signed. As previously pointed out, Asae Shimokawa testified and the trial court found that she had no knowledge or recollection of ever signing or having signed a continuing guaranty nor did she intend to sign or give a continuing guaranty to Liberty Bank, since the giving of a continuing guaranty for an unknown or unlimited amount would have been against the rules of conduct of the Internal Revenue Service where she worked. Further, if she had knowingly signed a continuing guaranty to Liberty Bank, she would certainly have revoked it at the time of her divorce in 1974. The fact that she had no business dealings whatsoever with Liberty Bank and that she knew nothing of her husband's loans at Liberty Bank would confirm that she had absolutely no knowledge of having signed a continuing guaranty to Liberty Bank. After hearing all the evidence, the trial court

stated at the trial: "I believe the testimony of Mrs. Shimokawa that she never even knew what she signed." Tr. 99.

14. On page five the appellate court's reference "to the trial court's conclusion of law that the absence of a limit on liability invalidated the contract" is a gross misstatement of the trial court's conclusion of law, for nowhere in its conclusions of law does the trial court invalidate the continuing guaranty on the basis of the absence of a limit on liability, "standing alone." Rather, the trial court based its conclusions of law on its findings of nonexecution and nondelivery of the continuing guaranty by Asae Shimokawa and also on its findings of lack of mutual assent or meeting of the minds between the parties and lack of consideration.

15. The appellate court's reference on page six to "appellant's (sic) responsibility to supply the limit (of liability) and her apparent failure to carefully read a document

to which she affixed her signature" is a flagrant misstatement of the facts, as it erroneously presupposes knowledge, awareness, and execution and delivery of the continuing guaranty on the part of Asae Shimokawa, contrary to the trial court's findings.

C. ABUSE OF APPELLATE POWER

The action of the Intermediate Court of Appeals in reversing the findings of the trial court and positing contrary "facts" to support its decision was, and is, without justification. The Intermediate Court of Appeals in effect acted as both the trial court and the appellate court. This was clearly an abuse of appellate power and a usurpation of the function and primacy of the trial court.

The Intermediate Court of Appeals obviously is not a trial court but an appellate court limited essentially to determining questions of law. Its jurisdiction is stated in Hawaii Revised Statutes §602-57 as follows:

> §602-57 Jurisdiction. The Intermediate appellate court shall have concurrent jurisdiction with the supreme court on all matters set out in section 602-5(1) through (7), subject to assignment of cases set out in section 602-5(8).

The pertinent subsection of Hawaii Revised Statutes §602-5 is subsection (1), to wit:

> §602-5 Jurisdiction and powers. The supreme court shall have jurisdiction and powers as follows:
>
> (1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency.

The review of the trial court's findings of fact by the Intermediate Court of Appeals in the case at bar was governed and delimited by the "clearly erroneous" rule of Rule 52(a), Hawaii Rules of Civil Procedure. Rule 52(a) of the Hawaii Rules of Civil Procedure is identical to Rule 52(a) of the Federal Rules of Civil Procedure, which served as the model for the Hawaii Rules of Civil Procedure. This rule as applied to findings of fact on

appeal has been enunciated repeatedly by the Intermediate Court of Appeals and the Supreme Court of the State of Hawaii in numerous cases as well as by other state courts and by the federal courts. See, e.g., Glens Falls Indemnity Co. v. United States, 229 F.2d 370, 373 (9th Cir. 1955); Lew Wah Fook v. Brownell, 218 F.2d 924, 925-26 (9th Cir. 1955); Hedger v. Reynolds, 216 F.2d 202, 203 (2d Cir. 1954); Shoemaker v. Takai, 57 Hawaii 599, 561 P.2d 1286 (1977); Campbell v. DePonte, 57 Hawaii 510, 559 P.2d 739 (1977); Title Guaranty Escrow Services, Inc. v. Powley, 2 Hawaii App. ____, 630 P.2d 642 (No. 7002, July 1, 1981); Wick Realty, Inc. v. Napili Sands Maui Corp., 1 Hawaii App. 448, 620 P.2d 750 (1980); American Security Bank v. Read Realty, Inc., 1 Hawaii App. 161, 616 P.2d 237 (1980). This rule has been summarized by the Supreme Court of the State of Hawaii in Shoemaker v. Takai, 57 Hawaii at 601, 561 P.2d at 1288, as follows:

> The standard in reviewing findings of fact is set forth in HRCP. HRCP, Rule 52(a), provides in pertinent part that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> Accordingly, we have held in numerous cases that findings of fact by a judge sitting without a jury will not be set aside unless clearly erroneous. Shinn v. Edwin Yee, Ltd., 57 Haw. 215, 553 P.2d 733 (1976); Miller v. Yoshimoto, 56 Haw. 333, 536 P.2d 1195 (1975).

Although it was hardly necessary to point out the well-settled "clearly erroneous" rule to the Intermediate Court of Appeals or to the Supreme Court of the State of Hawaii, as they had previously applied and enunciated this rule in other cases, this rule was nevertheless fully presented to the Intermediate Court of Appeals in petitioner's answering brief and also to the Hawaii Supreme Court in petitioner's application for writ of certiorari. Both courts, however, completely disregarded the clear mandate of

Rule 52(a) and the well-settled law applicable to review of findings of fact.

Nowhere in its decision does the Intermediate Court of Appeals even mention, let alone show, that the findings of the trial court are "clearly erroneous." Rather, the Intermediate Court of Appeals arbitrarily and capriciously disregarded and implicitly reversed the trial court's findings of fact and flagrantly proceeded to decide the case on contrary "facts" that it assumed and posited. Obviously, this was contrary to the "clearly erroneous" rule and beyond the limited appellate powers of the Intermediate Court of Appeals.

D. SINE QUA NON FOR FORMATION OF CONTRACT

The sine qua non for any contractual relationship between two or more parties is communication, for without communication there can be no negotiation and no mutual assent or meeting of the minds. In short, it is impossible for parties to agree on the

terms of a contract without communication. This is so clear and elementary that it hardly needs to be stated, except that the appellate court found that it was possible for two complete strangers who had never met or communicated with each other, directly or through their agents, to be bound by the terms of a continuing guaranty.

The conclusive fact in this case is the total absence of communication between Liberty Bank and Asae Shimokawa, directly or through their agents. The trial court found as a fact, as it could not but find from the evidence, that there was no communication whatsoever between Liberty Bank and Asae Shimokawa. F.F. Nos. 10, 18. Thus the total absence of communication precluded any mutual agreement or contractual relationship between the parties. It precluded not only mutual assent or meeting of the minds between them but also precluded any offer, acceptance, or consideration between them, for each of these

prerequisites to the formation of a contract necessarily required communication between the parties.

As it turned out, the appellate court completely disregarded the findings of the trial court and found a valid contract on assumed or posited facts. Thus the arbitrary action by the appellate court was clearly erroneous.

IV. CONSTITUTIONAL QUESTIONS

A. DENIAL OF DUE PROCESS OF LAW

The preceding analysis of both the trial court's findings and the erroneous appellate court decision shows beyond peradventure that the case at bar was arbitrarily and capriciously decided by the Intermediate Court of Appeals. Thus the question presented to this Court is whether or not the arbitrary and capricious action of the Intermediate Court of Appeals constitutes a violation of the due process clause of the Fourteenth Amendment. It is submitted

that the arbitrary and capricious decision of the Intermediate Court of Appeals clearly went too far and crossed the Rubicon.

While it is true that "a merely erroneous decision" by a state court does not amount to a denial of due process of law, a due process violation is indicated where a decision or action by a state court is arbitrary or capricious. See Roberts v. City of New York, 295 U. S. 264 (1935); American Railway Express Co. v. Kentucky, 273 U. S. 269 (1927); Postal Telegraph Cable Co. v. Newport, Ky., 247 U. S. 464 (1918); Wood v. Conneaut Lake Park, Inc., 386 F.2d 121 (3d Cir. 1967); Williams v. Tooke, 108 F.2d 758 (5th Cir. 1940), cert. denied, 311 U. S. 655 (1940).

The criterion established by this Court to determine whether a decision presents a constitutional or nonconstitutional question has been aptly summarized in Williams v. Tooke, 108 F.2d at 759, as follows:

> If all the judgments complained of were merely erroneous that would not amount to a denial of due process of law. American Railway Express Co. v. Kentucky, 273 U. S. 269, 47 S. Ct. 353, 71 L. Ed. 639. However, if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment. Postal Telegraph Cable Co. v. Newport, Ky., 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215.

The inevitable consequence of an arbitrary and capricious decision by a court is that it effectively denies a fair hearing to the injured party. The very nature of an arbitrary or capricious decision or action by an appellate court makes a mockery of all that preceded it, to wit, the trial, the findings and conclusions of the trial court, the written briefs on appeal, the oral argument on appeal, and the applicable law on appeal including prior judicial precedents. Thus an appeal becomes, in the words of Mr. Justice McReynolds, "an empty show." United

Gas Public Service Co. v. State of Texas, 303 U. S. 123, 158 (1948).

B. DENIAL OF EQUAL PROTECTION OF THE LAWS

In addition to denying petitioner due process of law, the appellate court also violated the equal protection clause of the Fourteenth Amendment in view of the fact that it had applied the "clearly erroneous" rule in prior cases which involved the "clearly erroneous" rule while it arbitrarily and capriciously changed the findings of the trial court and flagrantly disregarded the "clearly erroneous" rule in the instant case. Thus, the appellate court in the instant case discriminated against the petitioner and denied her the constitutional right to equal protection of the laws. See Postal Telegraph Cable Co. v. Newport, Ky., 247 U. S. 464 (1918); Shoemaker v. Takai, 57 Hawaii 599, 561 P.2d 1286 (1977); Campbell v. DePonte, 57 Hawaii 510, 559 P.2d 739 (1977).

V. IMPORTANCE OF GRANTING CERTIORARI

From time to time a court makes a decision that is so arbitrary, capricious and baseless that it cries out for redress. This is such a case. The case itself may be monetarily insignificant to all except the immediate parties but the precious principles of due process of law and equal protection of the laws and the integrity of our judicial system, based as it is on the rule of law, are all-important. It is important to stand up to arbitrary actions, in whatever form they occur. Arbitrary actions occur not only in police brutality cases but perhaps more often in ordinary civil cases. They are especially egregious when committed by appellate courts cloaked with the power of legal finality. Arbitrary actions by the use of words are no less arbitrary than arbitrary actions by the use of force. Our federal constitution, like our state constitution, proscribes not some but all forms of arbitrary action.

When clients and their attorneys go through so much trouble and expense in defending suits against them, it is unspeakably unjust to have their judgments reversed on appeal arbitrarily and capriciously. An arbitrary and capricious decision is not only a denial of due process to the injured party but undermines the efforts of trial courts and the integrity of our judicial system.

A terrible injustice has been inflicted on the petitioner in the instant case. To sanction or accept the arbitrary and capricious action of the appellate court would itself be inexcusable. If the arbitrary and capricious decision of the appellate court is allowed to stand, it will set a dangerous precedent for similar actions in the future. The decision of the appellate court which arbitrarily and capriciously reversed the findings, conclusions and judgment of the trial court is a negation and violation of all principles of due process, fairness and

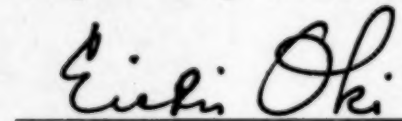
justice. Thus the decision of the Intermediate Court of Appeals should not, indeed must not, be allowed to stand, not only for the sake of the petitioner in the instant case but for the sake of future litigants and the integrity of the rule of law and our judicial system.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Intermediate Court of Appeals of the State of Hawaii.

DATED: Honolulu, Hawaii, October 27, 1981.

Respectfully submitted,



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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ASAE SHIMOKAWA, Petitioner,

v.

LIBERTY BANK, Respondent.

ON WRIT OF CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to NEIL F. HULBERT, Esq., Suite 2300, Pacific Trade Center, 190 South King Street, Honolulu, Hawaii 96813, counsel for respondent, in compliance with Rule 28 of the Revised Rules of the Supreme Court of the United States. I further certify

that all parties required to be served have been served.

DATED: Honolulu, Hawaii, October 27, 1981.

Eichi Oki

EICHI OKI
1270 Queen Emma Street, Ste. 612
Honolulu, Hawaii 96813
Counsel for Petitioner

[i]

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

FILED
1981 JUL -9 AM 9:35
Clement J. H. Chun
CLERK INTERMEDIATE
COURT OF APPEALS

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LIBERTY BANK, Plaintiff-Appellant, v.

JAMES W. SHIMOKAWA, Defendant, and

ASAE SHIMOKAWA, Defendant-Appellee

NO. 7189

APPEAL FROM FIRST CIRCUIT COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

CIVIL NO. 50806

JULY 9, 1981

HAYASHI, C.J., PADGETT AND BURNS, JJ.

APPENDIX A

GUARANTY.

The general rule is that the contract of guaranty is an enforceable undertaking or promise on the part of one person which is collateral to a principal obligation, e.g., a promissory note, on the part of another and which binds the guarantor to performance in the event of nonperformance by the principal debtor.

SAME - continuing guaranty.

A continuing guaranty is a kind of contract of guaranty that contemplates a future course of dealings between the principal debtor and the creditor over an indefinite period of time.

[ii]

SAME - same.

In operation, the continuing guaranty is an offer from the guarantor whose acceptance is manifested by the creditor's performance of a specific act

that results in the formation of a contract between the creditor and the guarantor. It remains in effect until revoked by the guarantor. Thus, a continuing guaranty does not guarantee a particular note or obligation but rather guarantees an overall indebtedness. The continuing guarantor is obliged to pay all the debts of the defaulting principals encompassed by the guaranty whether those debts are secured by other collateral or not.

SAME - same - nonapplicability of the Uniform Commercial Code.

The continuing guaranty contract, even where negotiable instruments are drawn in reliance on it, is not a transaction governed by the provisions of the Uniform Commercial Code.

SAME - same - consideration.

The present and future extensions of credit to the principal debtor are

generally deemed sufficient consideration to support a contract of guaranty.

SAME - same - interpretation.

The court cannot extend a continuing guaranty contract beyond its precise and undisputed terms.

SAME - same - absence of the limit on liability.

The absence of a limit on liability in a continuing guaranty is not, standing alone, a sufficient basis to invalidate the entire contract of continuing guaranty where the guarantor has the power to set the limit on liability.

APPENDIX A

[1]

OPINION OF THE COURT BY HAYASHI, C.J.

Liberty Bank appeals from the lower court's decision invalidating the continuing guaranty given it by Appellee Asae Shimokawa and releasing her from liability on a promissory note executed after the execution of the guaranty.

The underlying issues which merit consideration are (1) whether the continuing guaranty as executed by appellee is a valid, enforceable contract of guaranty between the appellee and the bank and (2) whether there was adequate consideration given for subsequent loans made by the appellant-bank to the husband.

For the reasons stated herein, we reverse and find that under the circumstances in this case, the continuing guaranty was valid and enforceable at all times relevant herein.

APPENDIX A

This action was commenced by the appellant-bank to collect on a promissory note executed by James Shimokawa, ex-husband of the appellee.

James Shimokawa applied for a $10,000.00 loan from appellant in February 1972. Henry Murakami, the bank's loan officer and a friend of James Shimokawa, required him to obtain a continuing guaranty by his wife of his indebtedness to the bank as a condition of the bank's approval of the loan. Murakami gave the form to Shimokawa to obtain his wife's signature. The funds were disbursed to him on February 11, 1972; and the continuing guaranty form was returned, signed by appellee on February 15, 1972. The space left for the limitation on liability was in blank. Prior to the trial in this action, appellee first denied having signed the guaranty. By the time of trial, however, the parties stipulated that the signature on the continuing guaranty was that of appellee.

APPENDIX A

At trial, she testified

[2]

she could not recall having signed the form; and if she had signed it, she hadn't intended to sign it, nor did she have knowledge of its content.

Between February 1972 and March 1975, a number of loans were extended to Mr. Shimokawa by Liberty Bank. The parties were divorced in July 1974, but the continuing guaranty was not revoked by the appellee. The appellant sued Mr. Shimokawa on a $15,718.42 note he executed in March 1975 and obtained a default judgment; and when that was not satisfied, this action was brought against appellee. The trial court ruled that the continuing guaranty was invalid at its inception for lack of consideration, and for lack of communication and mutual assent between Liberty Bank and appellee sufficient to form a contract of guaranty. In its findings of fact the court found that even

though appellee had stipulated that the signature on the contract was hers, there was no intent to sign a continuing guaranty of the debts of her husband.

At the outset, we think it is appropriate to address ourselves to the nature of the continuing guaranty contract and the obligations and liabilities arising thereunder with particular attention to the guaranty that is the subject of this action.

The general rule is that the contract of guaranty is an enforceable undertaking or promise on the part of one person which is collateral to a principal obligation, e.g., a promissory note, on the part of another and which binds the guarantor to performance in the event of nonperformance by the principal debtor. 38 AM. JUR. 2d Guaranty § 1 (1968); International Trust Co. v. Suzui, 31 Haw. 34 (1929). The

[3]

continuing guaranty is a kind of contract of guaranty that contemplates a

future course of dealings between the principal debtor and the creditor over an indefinite period of time. In operation, the continuing guaranty is an offer from the guarantor whose acceptance is manifested by the creditor's performance of a specific act that results in the formation of a contract between the creditor and guarantor. It remains in effect until revoked by the guarantor. 38 AM. JUR. 2d Guaranty § 63 (1968). Thus, a continuing guaranty does not guarantee a particular note or obligation, but rather guarantees an overall indebtedness. The continuing guarantor is obliged to pay all the debts of the defaulting principal encompassed by the guaranty whether those debts are secured by other collateral or not (which they can be). Union Planters National Bank of Memphis v. Markowitz, 468 F. Supp. § 29 (1979). However, the continuing guaranty contract, even where negotiable instruments are drawn in reliance on it,

is not a transaction governed by the provisions of the Uniform Commercial Code. EAC Credit Corp. v. King, 507 F.2d 1232 (5th Cir. 1975); Union Planters Bank of Memphis v. Markowitz, supra. The present and future extensions of credit to the principal debtor are generally deemed sufficient consideration to support the contract of guaranty. 38 AM. JUR. 2d Guaranty § 43 (1968); Oakland Bank of Commerce v. Washington, 6 Cal. App. 3d 793, 86 Cal. Rptr. 276 (1970); see also United States v. Lowell, 557 F.2d 70 (6th Cir. 1977).

In the case before us, the trial court found that the continuing guaranty contract was void because (1) the bank had failed to notify appellee of its acceptance of her guaranty, and (2) the bank failed to notify her of the

[4]

execution of the note on which this action is predicated, as the bank knew

or should have known the parties were divorced at the time of its making. However admirable and considerate it would have been to do so, the law does not impose such a requirement under the facts of this case. By the terms of the guaranty, the appellee specifically waived such notice; and we, accordingly, cannot extend this contract beyond its precise and uncontroverted terms. EAC Credit Corp. v. King, supra; Bank of Naperville v. Halz, supra.

The court also found that the continuing guaranty contract was void for lack of consideration at its inception because the initial loan funds were disbursed to Mr. Shimokawa on February 11, 1972, and the continuing guaranty bearing appellee's signature as requested by the bank was dated February 15, 1972. The trial court found that on these facts the loan was not made in reliance on the continuing guaranty. Such a finding is inconsistent with the law

governing the formation of contracts. Some courts have held that where a contract of guaranty is executed reasonably subsequent to the principal contract with the understanding that the contract of guaranty is the inducement to the execution of the principal contract, no new consideration is required. United States v. Lowell, supra. However, as a practical matter, whether the loan of February 11, 1972 was made in reliance on the continuing guaranty returned on the 15th is irrelevant to the question of whether the continuing guaranty was sufficient consideration for the March 1975 loan which is the subject matter of this action. See 38 AM. JUR. 2d Guaranty § 43, supra.

Appellant ascribes error to the court's finding that appellee, having admitted to signing the guaranty,

[5]

lacked the intent to do so. Appellee testified that she did not

remember ever signing the document in question; but that since her signature was there, she thought she was signing a loan document instead of a continuing guaranty. She said if she had signed it, she certainly would have revoked the guaranty when the parties were divorced in 1974. However, lapse of memory is not a valid basis on which to disprove intent sufficient to invalidate a contract. See Bank of Santa Ana v. Molina, 1 Cal. App. 3d 607, 81 Cal. Rptr. 885 (1969). Moreover, it is a fundamental rule of contract law that a competent party who signs a written instrument is bound by its terms; and in the absence of allegations of mistake, fraud, or duress, a failure to read or understand the contents of the instrument cannot relieve the signing party of the obligation imposed therein. Hayes v. Travelers Insurance Co., 93 F.2d 568 (1937); In Re Adoption of Baby Girl K, 26 Wash. App. 897, 615 P.2d 1310 (1980); Squires v. Woodbury, 621 P.2d 443

(Kan. App. 1980); Markell v. Sidney B. Pfeifer Foundation, 402 N.E.2d 76 (Mass. App. Ct. 1980).

The appellant also ascribes error to the trial court's conclusion of law that the absence of a limit on liability invalidated the contract. The failure of the appellee to limit her liability is, likewise, an insufficient basis to invalidate the contract. There is considerable authority for the view that the absence of a limit on liability in a continuing guaranty is not, standing alone, a sufficient basis to invalidate the entire contract of continuing guaranty where the guarantor has the power to set the limit on liability. See e.g. American Petrofina Co. of Texas v. Bryan, 519 S.W.2d 488 (Texas 1975), wherein the continuing guaranty failed to specify an upper limit on the liability of the guarantor. The court stated:

[6]

> Assuming that there were blanks when the instrument was signed, no evidence was offered that the body of the

> instrument was filled in incorrectly, fraudulently or contrary to the understanding of the two Bryans. The authority to fill in the blanks was entrusted to the agents of the Appellant, and the instrument is as good as if executed in complete form.

American Petrofina Co. of Texas v. Bryan, supra, at 488.

While this failure to supply a limit on liability is a major source of contention for the parties because of the appellant's responsibility to supply the limit and her apparent failure to carefully read a document to which she affixed her signature and the bank's error in overlooking the omission, we think neither is a sufficient basis to invalidate the entire contract. WILLISTON ON CONTRACTS, 3d.Ed. §§ 35 and 90A; see also North Carolina National Bank v. Corbett, 271 N.C. 458, 156 S.E.2d 835 (1967).

Because we are reversing the trial court's judgment, it is not necessary to

APPENDIX A

address the other issues raised by the appellant.

Accordingly, the judgment is reversed.

/s/ Yoshimi Hayashi

/s/ Frank D. Padgett

/s/ James S. Burns

Neil F. Hulbert
(Hong and Iwai of counsel)
for Plaintiff-Appellant

Eichi Oki
for Defendant-Appellee

APPENDIX A

NO. 7189

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1980

FILED
1981 JUL 29 PM 1:55
Clement J. H. Chun
CLERK SUPREME COURT

LIBERTY BANK,	CIVIL NO. 50806
Plaintiff-Appellant,	
v.	APPLICATION FOR WRIT OF CERTIORARI
JAMES W. SHIMOKAWA,	INTERMEDIATE COURT OF APPEALS
Defendant,	
and	HONORABLE YOSHIMI HAYASHI, FRANK D. PADGETT AND JAMES S. BURNS, JUDGES
ASAE SHIMOKAWA,	
Defendant-Appellee.	

ORDER

The Application for Writ of Certiorari is hereby denied.

DATED: Honolulu, Hawaii, July 29, 1981.

FOR THE COURT:

(Seal) /s/ William S. Richardson
Chief Justice

Masato Doi, Hideki Nakamura
(King, Nakamura & Takahashi,
of counsel) and Eichi Oki
for the Writ

APPENDIX B

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Attorneys for Defendant
ASAE SHIMOKAWA

1ST CIRCUIT COURT
STATE OF HAWAII
FILED
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CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LIBERTY BANK,	Civ. No. 50806
Plaintiff,	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	
JAMES W. SHIMOKAWA and ASAE SHIMOKAWA,	
Defendants.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial before the Court without a jury on July 14, 1978, and the Court, having considered the testimony of the witnesses, the exhibits in evidence, the records herein, and the memoranda and arguments of counsel, does hereby find the facts and state the

conclusions of law as follows:

FINDINGS OF FACT

1. This is an action by Plaintiff Liberty Bank against Defendant James W. Shimokawa for $13,808.57 on a Note and Security Agreement dated March 14, 1975 (hereafter referred to as "Note and Security Agreement") and against

[2]

Defendant Asae Shimokawa on a Continuing Guaranty dated February 15, 1972 (hereafter referred to as "Continuing Guaranty"). Default judgment in the total amount of $17,249.28 against Defendant James W. Shimokawa was filed herein on September 23, 1977.

2. Plaintiff is a Hawaii corporation with its principal place of business and post office address at 99 North King Street, Honolulu, Hawaii, and Defendants are and were at all times relevant herein residents of the City and County of Honolulu, State of Hawaii.

(Hereafter, Plaintiff will be referred to as "Liberty Bank" or "Bank" and the Defendants individually will be referred to by their respective names, "James W. Shimokawa" and "Asae Shimokawa.")

3. The Continuing Guaranty sued on is alleged to have been signed and delivered by Asae Shimokawa to Liberty Bank on or about February 15, 1972. Defendants were husband and wife at the time said Continuing Guaranty is alleged to have been signed and delivered on or about February 15, 1972. Defendants were divorced on July 31, 1974, in Honolulu, Hawaii. The Note and Security Agreement sued on was signed and delivered by James W. Shimokawa on March 14, 1975 at the Queen-Ward Branch of Liberty Bank.

4. Liberty Bank made a loan of $10,275.00 to James W. Shimokawa on February 11, 1972. The funds for the loan of February 11, 1972 had been disbursed to and received by James W. Shimokawa on February 11, 1972.

APPENDIX C

5. Liberty Bank gave James W. Shimokawa one of its printed forms of Continuing Guaranty and requested James W. Shimokawa to get his wife's signature. The Bank

[3]

received the Continuing Guaranty with the signature of "Asae F. Shimokawa" on or about February 15, 1972. The Bank does not know who delivered the Continuing Guaranty to the Bank.

6. The Continuing Guaranty guarantees all of the debts of James W. Shimokawa to Liberty Bank (past, present or in the future) for a blank or unknown amount and for an unlimited time, until it is revoked. The space on the Continuing Guaranty for the amount of liability had been left blank and incomplete and has never been filled in. The name of "James W. Shimokawa" appearing on the first page of the Continuing Guaranty was typed in by the Bank. The date, "this 15th day of February, 1972," was written in by

Henry Murakami, branch manager of the Queen-Ward Branch of Liberty Bank. Asae Shimokawa never authorized or instructed the branch manager to fill in the date. The address of "5042 POOLA ST." appearing next to the signature of "Asae F. Shimokawa" was filled in by someone other than Asae Shimokawa. Asae Shimokawa has admitted to the fact that the signature of "Asae F. Shimokawa" appearing on the Continuing Guaranty is her signature.

7. The Bank claims that the Continuing Guaranty dated February 15, 1972 was relied on for the loan made to James W. Shimokawa on February 11, 1972 and also for subsequent loans made by the Bank to James W. Shimokawa. Between the period February 11, 1972 to March 14, 1975, Liberty Bank made a total of twenty-one loans to James W. Shimokawa. Several of these loans were fully secured by certificates of deposits or savings accounts at the Bank. The last loan

of March 14, 1975 was partially secured by a 1969 Lincoln Continental sedan. No financial statement from Asae Shimokawa was ever requested or obtained by the Bank. Asae Shimokawa knew nothing about these loans nor did she receive or use any portion of the proceeds from these loans.

8. The branch manager of Liberty Bank who received the Continuing Guaranty testified that he checked the Continuing Guaranty only to see that there was a signature on the Continuing Guaranty and was not aware of the blank and incomplete space for the amount of liability.

9. Asae Shimokawa knew nothing about her former husband's loans with Liberty Bank or said Continuing Guaranty of February 15, 1972 until one of the Bank's employees advised her of their existence for the first time on May 7, 1976. If she had known of the

Continuing Guaranty at the time of her divorce on July 31, 1974, she would have revoked it.

10. The Note and Security Agreement of March 14, 1975 became delinquent in the summer of 1975. Asae Shimokawa first learned of the Continuing Guaranty and the Note and Security Agreement on May 7, 1976, the day that she spoke to a Bank employee by phone after her mother told her that she had signed for a certified mail from the Bank. Asae Shimokawa received a copy of the Continuing Guaranty and a copy of the Note and Security Agreement for the first time when she and her attorney went to Liberty Bank on May 7, 1976 to see the documents and to talk to a Bank official. At no time prior to May 7, 1976 was Asae Shimokawa ever notified or advised by the Bank or by James W. Shimokawa, orally or in writing or otherwise, concerning said Continuing

Guaranty or said Note and Security Agreement or any of the loans James W.

Shimokawa obtained from Liberty Bank. James W. Shimokawa never discussed the Continuing Guaranty or any of his loans at Liberty Bank with Asae Shimokawa and prior to May 7, 1976, there was no communication whatsoever between Liberty Bank and Asae Shimokawa.

11. Although Asae Shimokawa admits that the signature appearing on said Continuing Guaranty is her signature, she has no knowledge or recollection of ever signing or having signed said Continuing Guaranty nor did she intend to sign or give such Continuing Guaranty to Liberty Bank. The giving of a Continuing Guaranty for an unknown or unlimited amount would have been against the rules of conduct of the Internal Revenue Service, where Asae Shimokawa works.

12. Asae Shimokawa did not deliver or mail the Continuing Guaranty to Liberty Bank nor did she ask or authorize her former husband or anyone else to deliver or mail the Continuing Guaranty to Liberty Bank.

APPENDIX C

13. Asae Shimokawa never went to Liberty Bank to sign the Continuing Guaranty. She has not had any business dealings with Liberty Bank at any time in her life nor has she ever set foot in the Queen-Ward Branch of Liberty Bank where the loans to James W. Shimokawa were made.

14. Liberty Bank was aware of the Continuing Guaranty and the divorce between the Defendants at the time of the last loan on March 14, 1975 and was also aware of the financial difficulties of James W. Shimokawa at that time but did nothing to contact Asae Shimokawa to inform her of the Note and Security Agreement or the Continuing Guaranty at the time of the last loan on March 14, 1975.

[6]

15. The testimony of the branch manager of Liberty Bank that he relied on the Continuing Guaranty of February 15, 1972 for the first loan of February 11, 1972, that he

made a telephone call to Asae Shimokawa in early 1974 to advise her of a delinquent loan and the Continuing Guaranty, and that he did not know of the divorce between the Defendants at the time of the last loan on March 14, 1975 is incredible and contrary to the documents in evidence. His testimony that he did not notice the incomplete and blank space for the amount of liability at the time that he received the Continuing Guaranty on or about February 15, 1972 is also incredible. There was a long-standing friendship and business relationship of approximately eighteen years between the branch manager of Liberty Bank and James W. Shimokawa.

16. The Court believes the testimony of Asae Shimokawa and does not believe the testimony of Henry Murakami.

17. The Court is of the view that the Bank owed a duty of elementary fairness to its customers and all others whom it relies on or claims to rely on, such as Asae

Shimokawa, and this elementary fairness was lacking in this case. The Bank should have given Asae Shimokawa notice of the Continuing Guaranty or a copy thereof at the time that the Bank received the Continuing Guaranty on or about February 15, 1972 but in any event should have informed Asae Shimokawa of the Note and Security Agreement and the Continuing Guaranty on March 14, 1975, especially since the Bank knew at that time that the Defendants had already been divorced.

[7]

18. The Court finds that there was no mutual assent or meeting of the minds between Liberty Bank and Asae Shimokawa with respect to the Continuing Guaranty or with respect to the essential terms thereof, especially the amount of liability of Asae Shimokawa under the Continuing Guaranty. The total absence of communication between Liberty Bank and Asae Shimokawa precluded the formation of a contractual relationship between the Bank and

Asae Shimokawa and the requisite mutual assent or meeting of the minds for the formation of a contract between them.

19. The Court finds that the Continuing Guaranty was invalid at its inception for lack of consideration in that the Bank did not rely on the Continuing Guaranty in making the first loan to James W. Shimokawa on February 11, 1972 and that the Continuing Guaranty remained invalid throughout the period of the subsequent loans made by the Bank to James W. Shimokawa.

20. The Court finds for Defendant Asae Shimokawa and against Liberty Bank.

CONCLUSIONS OF LAW

1. The Court resolves the issue of credibility against Liberty Bank and in favor of Asae Shimokawa.

2. Upon the credible evidence adduced, Liberty Bank has failed to sustain the allegations of the Complaint as to Asae Shimokawa.

APPENDIX C

3. There being no communication and mutual assent or meeting of the minds between Liberty Bank and Asae Shimokawa with respect to the Continuing Guaranty or with

[8]

respect to the essential terms thereof, especially the amount of liability of Asae Shimokawa under the Continuing Guaranty, the said Continuing Guaranty is invalid.

4. The Continuing Guaranty is also invalid for lack of consideration.

5. Contracts of guaranty are strictly construed and a guarantor, like a surety, is bound only by the precise words of the guaranty.

6. The Complaint herein filed by Plaintiff Liberty Bank is dismissed as to Defendant Asae Shimokawa and judgment shall be entered for Defendant Asae Shimokawa in accordance herewith, together with costs and

attorney's fees as prayed for by Defendant Asae Shimokawa.

DATED: Honolulu, Hawaii, JUL 28 1978.

/s/ Yasutaka Fukushima (seal)
JUDGE OF THE ABOVE-ENTITLED COURT

NOT
APPROVED AS TO FORM:

/s/ Neil F. Hulbert
NEIL F. HULBERT
Attorney for Plaintiff

APPENDIX C

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1ST CIRCUIT COURT
STATE OF HAWAII
FILED
1978 AUG -1 PM 3:56
R. S. YAMADA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

LIBERTY BANK,	Civ. No. 50806
Plaintiff,	JUDGMENT
vs.	
JAMES W. SHIMOKAWA and ASAE SHIMOKAWA,	
Defendants.	

JUDGMENT

Pursuant to the oral decision at the trial hereof, the Findings of Fact and and Conclusions of Law filed herein on July 28, 1978, and the Order Overruling Plaintiff's Objections to Defendant's Findings of Fact and Conclusions of Law, Amending Conclusion of Law No. 2, Approving Findings of Fact and Conclusions of Law as Amended of Defendant

Asae Shimokawa, and Awarding Reasonable Attorney's Fees and Costs filed herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff's Complaint be and is hereby dismissed with prejudice.

[2]

2. That Defendant Asae Shimokawa be and is hereby awarded judgment against Plaintiff above named in the sum of $5,089.79 as and for reasonable attorney's fees and in the sum of $29.00 as and for costs, for a total judgment of $5,118.79.

DATED: Honolulu, Hawaii, AUG -1 1978 .

/s/ Yasutaka Fukushima (seal)
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

NEIL F. HULBERT
Attorney for Plaintiff

APPENDIX D

Opposition

Office - Supreme Court, U.S.
FILED
DEC 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASAE SHIMOKAWA,

Petitioner,

—v.—

LIBERTY BANK,

Respondent.

ON WRIT OF CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 81-813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ASAE SHIMOKAWA, Petitioner,

v.

LIBERTY BANK, Respondent.

ON WRIT OF CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondent alleges that the jurisdiction of this Court is improperly invoked under 28 U.S.C. Section 1257(3) in that no "title, right, privilege or immunity is specially set up or claimed under the Constitution...."

STATEMENT OF THE CASE

The following abbreviations will be used herein: "R" for the record of the trial court in Civil No. 50806; "R. of S.Ct." for the record of the Intermediate Court of Appeals of the State of Hawaii (hereinafter "Intermediate Court") and the Supreme Court of the State of Hawaii in No. 7189; "Opinion" for the Opinion of the Intermediate Court (Appendix "A" to the Petition for Writ of Certiorari); "Tr." for the transcript of the trial proceedings; "F.F." for the Findings of Fact of the trial court; and "C.L." for the Conclusions of Law of the trial court.

Petitioner's statement of the case is controverted in its entirety, including Petitioner's statement of how a federal question arose and was presented.

In February 1972, James Shimokawa (hereinafter "Shimokawa") applied to Respondent for a loan of $10,000 (Tr. 7/14/78, p. 13).

The loan was approved conditioned upon obtaining the signatures of Shimokawa and Petitioner who were then married to each other (Tr. 7/14/78, p. 13). At the time of the application and as a result of a conversation between Henry Murakami, Respondent's branch manager (hereinafter "Murakami") and Shimokawa, Murakami furnished Shimokawa with a form of Continuing Guaranty (Plaintiff's Exhibit 1, hereinafter "Ex. P1"). Thereafter, the Continuing Guaranty was returned to Respondent with Petitioner's signature on it (Ex. P1; Stipulation of Fact, R. 202; F.F., paragraph 6, R. 292). Murakami inserted the date of February 15, 1972, the date he received the Continuing Guaranty back at the Bank (Tr. 7/14/78, p. 16). The limitation of the Petitioner's liability was still blank, indicating no limit of liability (Ex. P1). On February 11, 1972, Respondent had booked the loan and dispersed the funds to Shimokawa (Tr. 7/14/78, p. 16). Murakami testified that in making the loan of February 11, he

relied on the Continuing Guaranty signed by Petitioner being returned to Respondent (Tr. 7/14/78, p. 16-17). Murakami further stated that he considered the loan and the Continuing Guaranty to be one transaction (Tr. 7/14/78, p. 17).

From 1972 to March 14, 1975, Shimokawa had executed approximately twenty (20) different promissory notes to Respondent, some being refinances and consolidations of earlier notes (Tr. 7/14/78, p. 17). The first loan after February 11, 1972, was dated April 19, 1972 (Tr. 7/14/78, p. 17-18 and Defendant's Exhibit B-1, hereinafter "Ex. D-B-1"). Murakami testified that in making the April 19, 1972, loan and all other loans not fully secured, including the subject loan of March 14, 1975, he relied upon the existence of the Continuing Guaranty by Petitioner (Tr. 7/14/78, pp. 18-19, 20-21, 23, 31).

The record is completely devoid of any evidence that Respondent through Murakami did not in fact rely on the Continuing Guaranty

signed by Petitioner in granting the loans of February 11, 1972 and March 14, 1975. However, the trial court found as a matter of fact that Murakami did not rely on the Continuing Guaranty for the February 11, 1972 loan (Tr. 7/14/78, p. 96, l. 16-21; F.F., R. 295).

Upon questioning by Petitioner's counsel, Murakami testified it was his understanding that if there is a blank in the amount of limitation of liability, the guarantor [Petitioner] would have the right to insert a dollar amount of limitation (Tr. 11/14/78, p. 34).

Petitioner testified that she signed various loan documents at her husband's request and that she usually did not read them prior to signing (Tr. 11/14/78, pp. 70, 72). Petitioner also testified that she signed a continuing guaranty to City Bank which had no limit to her liability (Tr. 11/14/78, pp. 69, 70, 71). Petitioner further admitted that she never revoked the Continuing Guaranty in writing, as required

by its terms (Tr. 11/14/78, p. 68 and Ex. P1, paragraph 2).

Respondent initiated suit against Petitioner and Shimokawa for recovery on the promissory note and the Continuing Guaranty. Respondent obtained default judgment against Shimokawa and proceeded to trial against Petitioner. The trial court ruled in favor of Petitioner and against Respondent. However, upon appeal, the Intermediate Court reversed the trial court's judgment and ruled in favor of Respondent and against Petitioner. Petitioner's Application for Writ of Certiorari to the Supreme Court of the State of Hawaii was thereafter denied.

Petitioner's reliance upon misstated facts, misquoted testimony and unfair characterizations of testimony exemplifies the inherent weakness of Petitioner's position. Perhaps one of the clearest misstatements of the fact is Petitioner's statement at page 11 of her Petition for Writ of Certiorari herein that: "The giving of a continuing guaranty

for an unknown or unlimited amount would have been against the rules of conduct of the Internal Revenue Service where she worked." The trial transcript contains only one reference to the Internal Revenue Service and appears as follows:

> "The Witness: I would have consulted with my attorney in trying to settle the thing. If necessary, write a letter of revocation to Liberty Bank because one of the things which we are impressed upon all the time--
>
> "Mr. Oki: Q. When you say we, what do you mean?
>
> "A. As an Internal Revenue Service employee, is that we have to be able to control our obligations. So I would not have gone into a debt for which I've--for an unlimited amount. I was--I think we had enough debts already at that time." (Tr. 7/14/78, p. 78)

Petitioner also states speculation as fact at page 11 of her Petition, wherein she states: "If she had known of the continuing guaranty at the time of her divorce on July 31, 1974, she would have revoked it." However, the undisputed facts show that even as of the

time Petitioner admits she knew of the Continuing Guaranty, she did not revoke it. How Petitioner can speculate that she would have revoked the Continuing Guaranty in 1974 when she did not revoke it in 1976 or thereafter is a mystery (Tr. 7/14/78, p. 68).

SUMMARY OF ARGUMENT

A. The trial court's findings of fact were clearly erroneous and there is no rule of law requiring the Intermediate Court to make an explicit statement of such determination.

B. Petitioner has failed to raise a federal question in a timely fashion to sustain the jurisdiction of this Court over a state court.

C. Mere error of judgment by a state court is neither a due process nor equal protection violation.

ARGUMENT

A. THE TRIAL COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS AND THERE IS NO RULE OF LAW REQUIRING THE INTERMEDIATE COURT TO MAKE AN EXPLICIT STATEMENT OF SUCH DETERMINATION.

Petitioner has presented this Court with her now familiar litany of irrelevancies, speculations and misstatements in support of her Petition for Certiorari to have this Court review the decision of the Intermediate Court. Petitioner's Petition is replete with the same recitation of "facts" as appeared in her briefs and argument before the Intermediate Court and Hawaii Supreme Court. Respondent has already demonstrated to the satisfaction of the Intermediate Court and Hawaii Supreme Court that such reliance is misplaced and that indeed the facts relied upon are in many instances not supported by the record or are based upon inadmissible testimony. In the final analysis, the primary support for the Petition is that Petitioner disagrees with

the Intermediate Court's and Hawaii Supreme Court's decisions. It is understandable that Petitioner is dissatisfied with having lost the case. However, that dissatisfaction does not make her position correct. Petitioner has wholly failed to show arbitrary and capricious action by the Intermediate Court or Hawaii Supreme Court, nor has Defendant identified any inconsistencies with prior decisions of the Intermediate Court or the Hawaii Supreme Court.

The Intermediate Court's decision discusses various aspects of the case and deals with and disposes of the primary findings of fact and conclusions of law reached by the trial court. The Intermediate Court held that:

1. The trial court erred in determining that the contract was void because Respondent failed to notify Petitioner of its acceptance of the guaranty (Opinion, p. 4);

2. The trial court erred in holding that the Continuing Guaranty was void because

of Respondent's failure to notify Petitioner of the note on which the lawsuit was predicated (Opinion, p. 4);

3. The trial court erred in finding that the Continuing Guaranty was void for lack of consideration at its inception (Opinion, p. 4);

4. The trial court erred in finding that Petitioner, having admitted signing the Guaranty, lacked the intent to do so (Opinion, p. 5); and

5. The trial court erred in concluding that the absence of a limit on liability invalidated the Continuing Guaranty (Opinion, p. 6).

Petitioner has put great weight, not only in the Petition but in her briefs before the Intermediate Court and Hawaii Supreme Court, upon the proposition that "the total absence of communication between the parties" indicated that there was a lack of mutual assent or meeting of the minds. This argument is so patently fallacious that it is in some

sense difficult to deal with. The communication between Respondent and Petitioner in this instance was, and the meeting of the minds was reflected by the signed Continuing Guaranty itself. The Intermediate Court recognized that lapse of memory cannot constitute sufficient grounds to invalidate a contract. Petitioner makes much of the fact that she never spoke to nor saw anyone at Liberty Bank. Yet, people daily sign documents and may never see or speak to the other contracting party. There was certainly nothing unusual, or indeed illegal, about parties agreeing to the terms of a contract without ever seeing or speaking to each other.

Although not specified by number, the Intermediate Court obviously reversed the trial court on F.F. Nos. 11, 12, 17, 18 and 19 and in C.L. Law 1, 2, 3 and 4. There is no rule of court or general rule of law that requires an appellate court to specify by number which findings or conclusions it

overturns. There is no requirement, as Petitioner implies, that an appellate court magically intone the words "clearly erroneous" when setting aside findings of fact. The Intermediate Court's Opinion makes it absolutely clear that it found certain findings clearly erroneous and so states without using those particular words. Petitioner is pursuing a form over substance position. Even a cursory review of the Court's decision shows that it has reversed the trial court on the findings and conclusions which were necessary for the trial court to have entered judgment in favor of Petitioner. Having done so, there is nothing internally inconsistent with reversing the judgment based on the remaining findings of fact and the correct application of the law as determeined by the Intermediate Court. Judgment for Respondent was supported by the findings of fact not overturned by the Intermediate Court.

B. PETITIONER HAS FAILED TO RAISE A FEDERAL QUESTION IN A TIMELY FASHION TO SUSTAIN THE JURISDICTION OF THIS COURT OVER A STATE COURT.

Petitioner argues to this Court that a Federal question sufficient for review has arisen by the Intermediate Court's "changing the trial court's findings of fact and disregarding the well-settled 'clearly erroneous' rule" and "disregarding fundamental principles of contract law" (Petition for Writ of Certiorari, page 14). Petitioner then goes on to argue that the Intermediate Court's action amounts to a denial of due process and equal protection under the 14th Amendment. Petitioner's argument fails since she has not raised a Federal question in a timely fashion.

Petitioner has attempted to bootstrap herself into this Court's jurisdiction by stating that the Federal questions "were fully presented to the Supreme Court of the State of Hawaii in Petitioner's application for a writ of certiorari" (Petition for Writ

of Certiorari, page 16). Such an allegation is simply not accurate. At no time in any of the state court proceedings has Petitioner argued that the appellate court's determination violated either due process or equal protection. After the Intermediate Court rendered its decision, Petitioner filed an Application for Writ of Certiorari to the Supreme Court of the State of Hawaii. Nowhere in the Application is there mentioned a violation of due process or equal protection under the 14th Amendment, nor are such violations even vaguely referred to. This Court has consistently held that a claim of Federal right is raised too late when it is alleged for the first time after the final decision of a state's highest court, even where the claim is raised in a petition for rehearing. Pim vs. St. Louis, 165 U.S. 273, 41 L.Ed. 714, 17 S. Ct. 322 (1897); McMillan vs. Ferrum Mining Co., 197 U.S. 343, 49 L.Ed. 784, 25 S. Ct. 533 (1905); Citizens National Bank vs. Durr, 257 U.S. 99, 66 L.Ed. 149, 42

S. Ct. 15 (1921). This Court has determined that it will not decide Federal constitutional issues raised for the first time on review of a state court decision. Cardinale vs. Louisiana, 394 U.S. 437, 22 L.Ed. 2d 398, 89 S. Ct. 1161 (1969). This Court has even held that presentation of a Federal question made upon a motion for rehearing in a state appellate court was insufficient to support a writ of certiorari where the Federal question had not been previously presented to the trial court or the state supreme court on the original hearing. American Surety Co. vs. Baldwin, 287 U. S. 156, 77 L.Ed. 321, 53 S. Ct. 98 (1932).

The appellate jurisdiction of this Court cannot be sustained on Federal questions raised for the first time in the petition to this Court for a writ of error to review the judgment of a state court. Hiawassee River Power Co. vs. Carolina-Tennessee Power Co., 252 U.S. 341, 64 L.Ed. 601, 40 S. Ct. 330

(1920); Rogers v. Clark Iron Co., 217 U.S. 589, 54 L.Ed. 895, 30 S. Ct. 693 (1910).

C. MERE ERROR OF JUDGMENT BY A STATE COURT IS NEITHER A DUE PROCESS NOR EQUAL PROTECTION VIOLATION.

Petitioner's argument on the merits amounts to nothing more than an allegation that the state court has erroneously interpreted state contract law and a rule of civil procedure. Petitioner alleges that the decision of the Intermediate Court was arbitrary and capricious and disregarded prior rulings and misapplied the "clearly erroneous" rule.

A claim that a state court's final judgment was erroneous is not indicative of a due process violation. The Third Circuit reviewed a number of the leading decisions on this point in Wood vs. Conneaut Lake Park, Inc., 386 F.2d 121 (1967). In reviewing the holdings of prior decisions, the Court noted as follows:

"Mere error of state law will not be declared to be a denial of due process. [citations omitted] The constitution does not guarantee that the decision of state courts shall be free from error, or require that pronouncements shall be consistent. [citations omitted] When the parties have been fully heard in the regular courts of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of its property without due process of law. [citations omitted]

"Mere error in a judgment entered by a state court having jurisdiction over the parties and the subject matter is not sufficient to raise a federal question under the Constitution. [citations omitted]

"The Constitution does not guarantee the plaintiff as a citizen against loss through erroneous decisions of state courts, nor does it guarantee uniformity of decisions by state courts [citation omitted]." 386 F.2d at 124-125.

Violations of due process and equal protection do not arise every time an aggrieved party loses a lawsuit. In Enterprise Irrig. District vs. Farmers Mut. Canal Co., 243 U.S. 157, 61 L.Ed. 644, 37 S. Ct. 318 (1917) this Court gave brief consideration to such a claim stating:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." [citations omitted] 243 U. S. at 166.

In Brinkerhoff-Faris Trust & Sav. Co. vs. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S. Ct. 451 (1930), Justice Brandeis noted that neither an errorneous decision by a state court nor the overruling of principles and doctrines established by prior decisions by a state court gives rise to a claim under the 14th Amendment nor otherwise confers jurisdiction on this Court.

The allegations made by Petitioner, even if true, which Respondent contests, do not raise the issue to a violation of the 14th Amendment.

CONCLUSION

Petitioner's Petition of Writ of Certiorari should be denied for three reasons:

1. Petitioner has not raised a Federal question in a timely fashion so as to confer jurisdiction on this Court;

2. Petitioner's allegations of arbitrariness and capriciousness by the Intermediate Court are simply unsupported by the record; and

3. Even if the allegations were true, error in judgment is not a deprivation of property without due process and overruling prior decisions is not a denial of equal protection.

For the foregoing reasons, Respondent respectfully requests the Petition for Writ of Certiorari be denied.

DATED: Honolulu, Hawaii, December 9, 1981.

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